

N^o. 444.

U.S. DISTRICT COURT, U. S.

FILED

OCT 24 1898

JAMES H. MCKENNA,
CLERK.

Motion Papers for J. C.

IN THE SUPREME COURT OF THE UNITED STATES.

Filed Oct. 24, 1898.

THE UNITED STATES *ex Rel.*

ALFRED L. BERNARDIN,

Plaintiff in Error,

v/s.

CHARLES H. DUELL, Commissioner of Patents.

} October Term, 1898.
No. 444.

MOTION TO ADVANCE HEARING.

And now comes Alfred L. Bernardin, plaintiff in error, by his attorney, Julian C. Dowell, this 24th day of October, 1898, and moves that an order be made advancing the above-entitled cause on the calendar, and assigning the same for hearing at an early date, to be fixed by the Court.

THE QUESTION INVOLVED.

This case presents the question of the constitutionality of the Act of Congress approved February 9, 1893, conferring jurisdiction upon the Court of Appeals of the District of Columbia to entertain and determine appeals from the decision of the Commissioner of Patents in interference cases. Prior to said Act of Congress, establishing a Court of Appeals for the District of Columbia, no provision was made for appeals from decisions of the Commissioner of Patents in *interference cases*. Section 9 of that Act provided that the determination of appeals from the decision of the Commissioner of Patents, then vested in the general term of the Supreme Court of the District of Columbia, in pursuance of the provisions of the Revised Statutes of the

United States, relating to the District of Columbia, should thereafter be vested in the Court of Appeals created by said act;

"and, in addition, any party aggrieved by a decision of the Commissioner of Patents in any interference case may appeal therefrom to said Court of Appeals."

The present case grows out of an interference in the Patent Office, under the provisions of Section 4904 of the Revised Statutes, between Alfred L. Bernardin, president and superintendent of the Bernardin Bottle Cap Company, of Evansville, Indiana, and William H. Northall, an employee of the Bernardin Company, acting in the interest of the Crown, Cork and Seal Company, a corporation of Baltimore, Md.; the subject of the controversy being a bottle-sealing device.

The Commissioner of Patents, Hon. John S. Seymour, decided that Bernardin was the prior inventor and entitled to the patent, but on appeal to the Court of Appeals of the District of Columbia the decision of the Commissioner of Patents was reversed, whereupon mandamus proceedings were instituted in the Supreme Court of the District of Columbia to compel the issue of a patent to Bernardin in accordance with the Commissioner's decision, on the ground that "notwithstanding the Act of Congress, approved February the 9th, 1893, *in form* confers jurisdiction upon the Court of Appeals of the District of Columbia, to hear an appeal on error prosecuted from the action of the Commissioner of Patents, an officer of the executive department of the Government, and to review the official action of said officer of the executive department, and to revise and reverse or nullify said action, said statute is, to the extent that it attempts to confer jurisdiction upon the Court of Appeals of the District of Columbia to review, reverse, or nullify the action of

the executive branch of the Government, unconstitutional, inoperative, and void, and that the said decision rendered and certified in that behalf is *coram non judice* for want of constitutional authority to entertain, hear, and control by judicial action the official acts of the executive department." (Transcript, p. 6.)

The petition for mandamus was dismissed by the Supreme Court of the District of Columbia, and the judgment of the lower court was affirmed upon appeal to the Court of Appeals of the District of Columbia, in a decision rendered March 1, 1897. (U. S. *ex rel.* Bernardin *vs.* Seymour, 10 App. D. C., 294). In the concluding clause of its aforesaid decision the Court of Appeals said :

"Without further prolonging the discussion of this interesting question, and admitting that we are not without doubt in respect of the soundness of our judgment, we repeat that we have not been able to see our way to the conclusion urged upon us—namely—that the act conferring the right of appeal to this court from the decisions of the Commissioner of Patents is beyond the power of Congress to enact, for the reason that it oversteps the boundaries erected by the Constitution between the three great departments of the Government."

REASONS IN SUPPORT OF MOTION.

This case presents the same questions and is based upon the same state of facts as the case of the United States *ex rel.* Alfred L. Bernardin *vs.* Benjamin Butterworth, Commissioner of Patents, pending before this Honorable Court at the October term, 1897, No. 404, and which abated by reason of the death of the defendant in error, the Honorable Benjamin Butterworth, Commissioner of Patents. (Bernardin *vs.* Butterworth, 169 U. S., 600.) A previous case, involving the same question and based upon the same state of facts also abated while pending

before the Court of Appeals of the District of Columbia, by reason of the resignation of Mr. Commissioner Seymour. (Transcript, p. 60.)

Should a vacancy again occur in the office of Commissioner of Patents, while this case remains pending and undetermined, the action would again abate, to the cost and injury of the plaintiff in error, who has already paid costs three times, in his endeavor to have the question presented finally determined by this Honorable Court, and thus the final determination of the important question involved might be indefinitely deferred.

I am authorized by the Honorable the Solicitor General to state that the Government joins in the request that the hearing of the case be advanced.

Respectfully submitted,

JULIAN C. DOWELL,

Of Counsel for Bernardin.